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Yong Teck Lee v Harris Mohd Salleh & Anor

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08–46 OF 2002(S)
JAMES FOONG FCJ
12 MAY 2009

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Civil Procedure — Costs — Federal Court — Application to Federal Court judge to review award of costs by deputy registrar — Getting-up fee for respondent in opposing leave application in Federal Court — Whether respondent's counsel did extensive research and preparation despite burden on appellant to obtain leave — Courts of Judicature Act 1964 s 96

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Civil Procedure — Costs — Taxation — Getting-up — Review of decision of deputy registrar — When court can interfere with decision of deputy registrar — Whether taxing officer exercised discretion based on wrong principles — Whether quantum allowed manifestly inadequate — Whether failed to consider relevant facts

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This matter arose out of election petitions filed by the respondents. The petitions were allowed and the appellant's appeal to the Court of Appeal was dismissed and his application for leave to appeal to the Federal Court was unsuccessful. The respondents subsequently applied to tax the costs incurred in opposing the leave application in the Federal Court. The deputy registrar of the Federal Court handed down to the respondents a sum of RM16,000 as getting-up fees against a claim of RM400,000. Dissatisfied with this, the respondents applied to the deputy registrar to review her own decision. The deputy registrar refused to revise the amount awarded, inter alia, on the grounds that: (1) in the leave application before the Federal Court the burden was more on the applicant to convince the Federal Court that he had complied with the requirements of s 96(a) of the Courts of Judicature Act 1964 ('Act'); (2) it was the applicant who had to do extensive research to enable him to submit to the Federal Court and convince the court on the operation of s 36 of the Election Offences Act 1954; and (3) only a single issue existed before the Federal Court on whether the election court's decision was appealable. The respondents filed this summons in chambers to a judge of the Federal Court to review the deputy registrar's decision.

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Held, allowing the appeal:

(1) The court will not interfere with the decision of a taxing officer upon a mere question of quantum if the taxing officer has exercised her discretion after due consideration of all circumstances and if no question of principle arises. Only when such discretion has been exercised based on some wrong principle or the quantum allowed is obviously wrong, a judge will interfere (see para 16); *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97 referred.

(2) When there is no certainty of success in the outcome of any litigation, equal demand is made on counsel from each side of their skill, knowledge and research to argue a point in favour of their client. Each has to meet the challenges mounted by the other. In the present instance, the respondents were faced with a formidable team led by a silk who specialised in constitutional law. It was not unreasonable to expect a relative output of quality from the respondents' counsel to match this. There was also the demand on the respondents' counsel to rebut the view of the dissenting judge of the Court of Appeal (see para 32).

(3) The deputy registrar had failed to consider relevant facts and on those she did, drew wrong inferences from them. The amount she awarded was manifestly inadequate and grossly insufficient based on the facts before her (see para 37).

(4) In an application for leave to appeal to the Federal Court, getting-up fees should not be equated to costs awarded for getting-up in an interlocutory application in the High Court. There should be some degree of gravity and importance attached to the filing of an application in the Federal Court even though it is for leave to appeal. Applicants for leave to appeal to the Federal Court must ensure that their matter falls within the criteria of s 96 of the Act. For this, detailed study and preparation is necessary and this applies equally to those opposing. For such respondents' efforts, a sum of RM100,000 was a fair and reasonable amount for getting-up fees (see para 37).

[Bahasa Malaysia summary

Perkara ini ditimbulkan oleh petisyen pilihan raya yang difailkan oleh responden-responden. Petisyen-petisyen tersebut dibenarkan dan rayuan perayu ke Mahkamah Rayuan ditolak dan permohonannya untuk kebenaran merayu ke Mahkamah Persekutuan gagal. Responden-responden kemudiannya memohon untuk mengenakan cukai kepada kos yang ditanggung dalam membantah permohonan kebenaran di Mahkamah Persekutuan. Timbalan pendaftar Mahkamah Persekutuan membenarkan

A sejumlah RM16,000 kepada responden-responden sebagai bayaran penyediaan guaman terhadap tuntutan RM400,000. Tidak berpuas hati dengan keputusan tersebut, responden-responden memohon kepada timbalan pendaftar untuk menyemak semula keputusannya. Timbalan pendaftar enggan menyemak jumlah yang diawardkan, antara lain, atas dasar
B bahawa: (1) dalam permohonan kebenaran di Mahkamah Persekutuan beban adalah lebih kepada pemohon untuk meyakinkan Mahkamah Persekutuan bahawa dia telah mematuhi keperluan s 96(a) Akta Mahkamah Kehakiman 1964 ('Akta'); (2) pemohon yang perlu melakukan kajian terperinci untuk membolehkan dia mengemukakannya ke Mahkamah Persekutuan dan
C meyakinkan mahkamah mengenai proses s 36 Akta Kesalahan Pilihanraya 1954; dan (3) hanya satu isu yang wujud di Mahkamah Persekutuan iaitu sama ada keputusan mahkamah pilihan raya boleh dirayu. Responden-responden memfailkan saman dalam kamar kepada hakim Mahkamah Persekutuan untuk menyemak semula keputusan timbalan
D pendaftar.

Diputuskan, membenarkan rayuan:

E (1) Mahkamah tidak akan campur tangan dengan keputusan pegawai cukai mengenai persoalan kuantum sekiranya pegawai cukai telah menggunakan budi bicaranya selepas mempertimbangkan semua keadaan dan sekiranya tiada soalan mengenai prinsip timbul. Hanya apabila budi bicara tersebut dilaksanakan berdasarkan prinsip yang
F salah atau kuantum yang dibenarkan secara jelasnya adalah salah, maka hakim akan campur tangan (lihat perenggan 16); *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97 dirujuk.

(2) Apabila tiada kepastian mengenai kejayaan dalam sebarang keputusan litigasi, tuntutan yang sama dibuat ke atas peguam daripada kedua-dua
G pihak mengenai kemahiran, pengetahuan dan kajian untuk mengemukakan perkara yang memihak klien mereka. Masing-masing perlu berdepan dengan cabaran daripada pihak lain. Dalam kes ini, responden-responden berdepan dengan pasukan yang diketuai oleh
H seorang yang pakar dalam undang-undang perlembagaan. Adalah tidak munasabah untuk menjangkakan hasil kualiti yang relatif daripada peguam responden-responden untuk menyamai mereka. Terdapat juga tuntutan daripada peguam responden-responden untuk mematahkan pandangan hakim menentang Mahkamah Rayuan (lihat perenggan 32).

I (3) Timbalan pendaftar gagal untuk mempertimbangkan fakta-fakta yang relevan dan dia telah membuat inferens yang salah daripada apa yang dipertimbangkan olehnya. Jumlah yang diawardkan tidak memadai dan secara kasar tidak mencukupi berdasarkan fakta yang dikemukakan kepadanya (lihat perenggan 37).

(4) Dalam permohonan untuk kebenaran merayu ke Mahkamah Persekutuan, bayaran penyediaan guaman tidak sepatutnya sama dengan kos yang diawardkan untuk penyediaan guaman permohonan interlokutori di Mahkamah Tinggi. Walaupun ianya untuk kebenaran merayu, permohonan tersebut perlu mempunyai tahap graviti dan kepentingan untuk difailkan ke Mahkamah Persekutuan. Pemohon-pemohon yang memohon kebenaran merayu ke Mahkamah Persekutuan perlu memastikan bahawa perkara mereka terangkum dalam kriteria s 96 Akta. Untuk itu, kajian yang terperinci dan persediaan adalah penting dan ini juga dikenakan terhadap pihak yang membantah. Untuk usaha responden-responden, sejumlah RM100,000 adalah jumlah yang adil dan saksama untuk bayaran penyediaan guaman (lihat perenggan 37).]

Notes

For cases on costs in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1867–2239.

For cases on taxation, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2153–2222.

Cases referred to

Bar Council v Datuk V Kanagalingam [2000] 3 AMR 3383, FC (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (refd)

Pang Kok v Leong Fock Hap & Anor [1996] 4 MLJ 97, HC (refd)

White v Altrincham Urban District Council [1936] 1 All ER 923, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96, 96(a)

Election Offences Act 1954 ss 11(1)(c), (d), 32, 36, 37

Federal Constitution art 121(1B)

Rules of the Federal Court 1995 r 3

Rules of the High Court 1980 O 59 rr 34, 36, 36(1), Appendix 1, Part IV items 26, 27, Part V, Part X item (e)

Appeal from: Civil Appeal No S-04–75 of 2001 (Court of Appeal, Kuala Lumpur)

Ansari Abdullah (Ansari & Co) for the appellant.

Alex Decena (John Sikayun with him) (Luping & Co) for the respondents.

James Foong FCJ:

[1] The deputy registrar of the Federal Court has refused to review her own

decision where she awarded only a sum of RM16,000 to the respondents for getting-up fees against a request for RM400,000 in the respondents' bill of costs.

[2] Dissatisfied with this, the respondents filed this summons in chambers to a judge of the Federal Court to review the decision of the deputy registrar pursuant to O 59 r 36(1) of the Rules of the High Court 1980 ('RHC') which is applicable to the Federal Court by virtue of r 3 of the Rules of the Federal Court 1995.

[3] Order 59 r 36 of the RHC says:

> (1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with rule 35 (3) to state the reasons for his decision in respect of that item or part on the review.

BACKGROUND OF THE CASE

[4] The background of this case is this: the applicant and both the respondents were candidates in a Sabah State election held on 13 March 1999 for the constituency of Likas. After the election, the appellant was declared the winner. Both the respondents were dissatisfied with this outcome. They respectively filed election petitions to challenge the result. Both the election petitions were consolidated and heard by the election judge, Justice Muhamad Kamil. After 28 days of staggered trial, the election judge ruled that the applicant had committed an election offence under ss 11(1)(c), (d) and 32 of the Election Offences Act 1954, in respect of the first petition ('K5'). He accordingly declared the election result for this constituency null and void.

[5] In respect of the second petition ('K11'), having come to a conclusion that the electoral roll for the said constituency contained names of non-citizens and disqualified persons, the said judge also declared that the election result for this constituency null and void.

[6] Upon these decisions, a certificate and a report required under ss 36 and 37 of the Election Offences Act were issued to announce that the applicant is not returned as an elected representative to the state assembly of Sabah for the constituency of Likas.

[7] Dissatisfied with this decision, the applicant filed an appeal to the Court of Appeal challenging the decisions of the election court. Further, in view of the effect of the certificate and report issued by the election court which requires the election commission to hold a by-election within a specific time, the applicant applied for and obtained an order to stay the execution of the election court's orders pending an appeal to the Court of Appeal.

[8] On 6 June 2002, the Court of Appeal by majority (with Justice KC Vohrah dissenting) dismissed the applicant's appeal on the ground that a decision of the election court is not appealable.

[9] Refusing to accept this decision, the applicant on 1 July 2002, filed an application to the Federal Court for leave to appeal against the decision of the Court of Appeal. Pending the disposal of this leave application to the Federal Court, the applicant obtained an order to stay the effect of the election court's decisions.

[10] On 3 September 2002, the applicant's leave application to the Federal Court was heard. His application was refused.

[11] By 23 April 2003, the respondents had filed their notice of taxation and bill of costs for costs incurred in opposing the applicant's leave application in the Federal Court.

[12] On 20 August 2003, the deputy registrar of the Federal Court handed down to the respondents a sum of RM16,000 as getting-up fees against a claim of RM400,000.

[13] Dissatisfied with this, the respondents applied to the deputy registrar of the Federal Court to review her own decision under O 59 r 34 of the RHC which again is applicable by virtue of r 3 of the Rules of the Federal Court 1995.

[14] On 15 February 2006, the deputy registrar refused to revise the amount awarded; hence this application before me.

APPROACH

[15] I feel the need at the outset to lay down the approach regarding this sort of application.

[16] First, it is well established that the court will not interfere with the decision of a taxing officer upon a mere question of quantum if the taxing officer has exercised her discretion after due consideration of all circumstances and if no question of principle arises. It is only when such discretion has been exercised based on some wrong principle or the quantum allowed is obviously wrong that a judge will interfere — see *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97.

[17] An elaboration of this proposition is found in *White v Altrincham Urban District Council* [1936] 1 All ER 923 where Slesser LJ said:

> In my opinion, the judge had no power to disturb the discretion of the registrar expressly given him by the rule on a mere question of quantum unless the registrar has purported to exercise that discretion in a way not warranted by law. That such a view had long been held in proceedings in the High Court cannot be disputed. In *Alsop v Lord Oxford* (1833) 1 My & K 564 at p 566, Sir John Leech MR said:
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> > Generally speaking, the decision of the master on taxation is final: he is the sole judge of the fact whether the business had been done, and of the proper charge to be made for it; the court will only interfere where the master acts upon some mistaken principle.

[18] And for the latest, Justice Chong Siew Fai CJ (Sabah and Sarawak) in the Federal Court case of *Bar Council v Datuk V Kanagalingam* [2000] 3 AMR 3383 concluded:

> On the authorities, it is clear that in exceptional cases where it can be shown that wrong principle was applied, or there is some other material error, the judge upon review can set aside or amend the award on quantum.

PRINCIPLES APPLIED BY THE DEPUTY REGISTRAR

[19] In her written grounds, the deputy registrar discloses: 'Suffice to say as a taxing officer, I'm guided by the principles laid down in taxation proceedings and also consideration spelt out in note items 26 and 27 Appendix 1 Part V, Scale of Costs of the Rules of the High Court.'

[20] I believe there is a typographical error when the deputy registrar referred to Part V of Appendix 1 of the Scale of Costs of the RHC in respect of items 26 and 27. These are actually found in Part IV of Appendix 1 and not Part V.

[21] And items 26 and 27 of this Part IV state:

26	Instructions for trial or hearing of any cause or matter, whatever the mode of trial or hearing	Discretionary
27	Instructions for appeal from interlocutory or final order or judgment	Discretionary

Note to items 26 and 27 —

These items are intended to cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including —

(a) Taking instructions to sue, defend, counterclaim or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or claim in a reference under Order 70 rule 39;

(b) Considering the facts and law;

(c) Attending on and corresponding with client;

(d) Interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;

(e) Arranging to obtain reports or advice from experts and plans, photographs and models;

(f) Making search in a Government Office and elsewhere for relevant documents;

(g) Inspecting any property or place material to the proceedings;

(h) Perusing pleadings, affidavits and other relevant documents;

(i) Where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement; and

(j) The general care and conduct of the proceedings.

[22] In her conclusion, the deputy registrar declared: 'Lastly, bearing in mind the principles as set out in s 1(2) of Appendix 1, Part X of Order 59 of the Rules of High the Court 1980 and the principle in the various cases referred to me by both counsel for the respondents and applicant I am of the view the amount of RM16,000 — awarded as getting-up fees in this leave application is a fair and reasonable amount.'

[23] For enlightenment, Part X referred to provides:

1 Discretionary costs

(1) Where in the foregoing provisions of this Appendix there is entered in

A the second column against any item specified in the first column either an upper and a lower sum of money or the word 'Discretionary', the amount of costs to be allowed in respect of that items shall (subject to any order of the Court fixing the costs to be allowed) be in the discretion of the Registrar, within the limits of the sums so entered, if
B any.

(2) In exercising his discretion under this paragraph or under rule 31 (2) in relation to any item, the Registrar shall have regard to all relevant circumstances, and in particular to —

C
(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialized knowledge, and responsibility required of, and the time and labour expended by, the solicitor or counsel;

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(c) The number and importance of the documents (however brief) prepared or perused;

(d) The place and circumstances in which the business involved is transacted;

E
(e) The importance of the cause or matter to the client;

(f) Where money or property is involved, its amount or value;

(g) Any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where
F work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

G REASON OF THE DEPUTY REGISTRAR

[24] Having set out the principle relied on by the deputy registrar, I shall now disclose the reasons proffered by her for her decision.

H **[25]** In maintaining her decision that a sum of RM16,000 is sufficient as getting-up fees, the deputy registrar argued that before 'the Federal Court is a mere leave application' and, the burden was more on the applicant to convince the Federal Court that he has complied with the requirements set out in s 96(a) of the Courts of Judicature Act. The deputy registrar then
I repeated that 'The uphill task was in fact on the applicant and not the respondents'.

[26] In rebutting the submission of the respondents on the issue of complexity and novelty and the requirement of special knowledge, skill and extensive research to contest the applicant's application for leave in the Federal Court, the deputy registrar said that it 'was the applicant who has to do extensive research to enable him to submit to the court (Federal Court) and convince the court on the operation of s 36 of the Election Offences Act 1954'.

[27] In fact, she insisted that there was only one issue before the Federal Court, and that is whether the decision of an election judge is appealable, and according to her, this issue is not novel since a long line of cases has persistently decided in the negative.

[28] Regarding the contention of the respondents that the parties in this case are prominent personalities and that the case was of public importance, the deputy registrar commented that 'this is just one of the factors the court should consider, however it is not the only factor to consider'.

ANALYSIS

[29] When considering this review, I believe it necessary to touch briefly on the requirement of s 96(a) of the Courts of Judicature Act 1964. This section provides:

> Subject to ... any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court ...
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or ...

[30] An elaboration of this is found in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 where Justice Edgar Joseph Jr (FCJ) said:

> To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in a civil cases sparingly and will not grant such leave unless *both* of the following criteria are satisfied by an intending appellant:
>
> (1) the judgment of the Court of Appeal has raised a point of general

principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be of public advantage; and

(2) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal.

[31] So what the deputy registrar is stressing is that the demand for this special knowledge, skill and extensive legal research was more on the applicant rather than the respondents for it was incumbent upon the applicant to convince the Federal Court that he had crossed the threshold set out in s 96(a) of the Courts of Judicature Act.

[32] I am afraid that the deputy registrar has taken a lopsided view of this. When there is no certainty of success in the outcome of any litigation, equal demand is made on counsel from each side of their skill, knowledge and research to argue a point in favour of their client. One cannot say that the demand for these qualities from one party is greater than the other. Each has to meet the challenges mounted by the other. And in this instance, the respondents were faced with a formidable team lead by a silk who specialises in constitutional law. Thus, it is not unreasonable to expect a relative output of quality from the counsel engaged by the respondents to match this. Further, there was also the demand on the respondents' counsel to rebut the view of the dissenting judge of the Court of Appeal. This contrary opinion would naturally be seized upon by the applicant to convince the Federal Court into granting leave. So it is incorrect, in my opinion, for the deputy registrar to infer that the respondents were 'home and dry', so to speak, in this application as compared to the applicant. Viewed against these facts, the demand of a lower degree of skill, special knowledge and legal research of counsel for the respondents is therefore baseless and unsustainable.

[33] Another pertinent factor singled out by the deputy registrar for her consideration was the existence of a single issue before the Federal Court compared to a multiple of issues. According to her, even on this sole issue of whether the decision of the election court is appealable, there is already a long line of authorities against the applicant.

[34] Regrettably, this is a somewhat narrow approach. Though there may be a series of consistent decisions on this one issue if it can be proved that they are uniformly wrong then this might be sufficient to justify leave to be granted by the Federal Court to appeal. Support for this proposition is found in the Federal Court case of *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application*:

But, if an intending appellant could demonstrate that the judgment of the Court of Appeal raises a point of law of great general importance upon which there has been a consistent current of judicial opinion which may have been uniformly wrong, that may well be enough for leave to be granted. *Fisher v Oldham Corporation* [1930] 2 KB 364 was a case where the question at issue was one of great importance to the public and illustrates how 'a line of authorities' may gradually grow in the wrong direction because one important precedent has escaped attention.

[35] In this particular instance, the appellant was attempting to convince the Federal Court that due to the creation the Court of Appeal under art 121(1B) of the Federal Constitution, a decision of the election court is not absolute; it is appealable. This novel and complex point has never been decided in previous cases. Thus this single issue may be accepted by the Federal Court to grant leave. Viewed from this perspective, it is my opinion that the deputy registrar has erred in her observation.

[36] Another factor that the deputy registrar failed to give due prominence is the importance of the cause or matter to the client (see item (e) of Part X in the Appendix 1 of the Scale of Costs of the RHC). Though the deputy registrar admitted that this is one of the many factors to be considered, she failed to give significance to it. In this case the applicant, an elected representative of the state assembly of Sabah, was challenged by two candidates of substance who took part in the same election. The first was a former Chief Minister of Sabah and the other, an ex-Senator. The decisions of the election court, if upheld, have far reaching consequences. For the applicant, it means not only vacating his seat in the state assembly but also disqualification from participating in an election for five years. And for the respondents and general public, particularly those electorates in the Likas constituency, there will be a new election. So the cause or matter weigh heavy consequences to the respondents and forms an important and relevant factor for consideration when determining the amount of getting-up fees.

CONCLUSION

[37] For reasons expressed above, I conclude that the deputy registrar has failed to consider relevant facts in this case and on those she did, drew wrong inferences from them. The amount she has awarded is manifestly inadequate and grossly insufficient based on the facts before her. I was informed by counsel appearing before me that the getting-up fees for the respondents at the election court was RM80,000 and at the Court of Appeal was about RM100,000 for the first respondent and RM50,000 for the second respondent. Now the respondents are seeking RM400,000. I think this is excessive. The amount to be varied must of course be in accordance with the

guidelines set out under the rules but certainly in an application for leave to appeal to the apex court of the land, getting-up fees should not be equated to costs awarded for getting-up in an interlocutory application filed in the High Court. There should be some degree of gravity and importance attached to the filing of an application in the Federal Court even though it is for leave to appeal. Otherwise, anyone dissatisfied with any decision of the Court of Appeal will proceed to file such application with the hope that if granted would have another chance to argue his case for only a minimal sum as costs if rejected. Application for leave to appeal to the Federal Court must be taken seriously and anyone who attempts this must ensure that their matter falls within the criteria of s 96 of the Courts of Judicature Act. For this, detail study and preparation is necessary and this applies equally to those opposing. For such respondents' efforts, I am of the view that a sum of RM100,000 is a fair and reasonable amount for getting-up fees. Accordingly, I revise the costs awarded to the respondents from a modest sum of RM16,000 to RM100,000.

Appeal allowed.

Reported by Kanesh Sundrum